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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

VINCENT GONZALEZ,

Petitioner,

against

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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Pursuant to the Revised Rules of this Court, Rule 22, the respondent submits this brief in opposition to the captioned petition for a writ of certiorari.

Preliminary Overview

Petitioner was convicted in the County Court, Westchester County, upon a plea of guilty, of the crimes of Criminal Possession of a Controlled Substance in the Third Degree (two counts), Criminal Possession of a Weapon in the Third Degree, Conspiracy in the Fourth Degree (three counts), and Criminal Possession of Marijuana. He was sentenced thereon, on October 31, 1984, to indeterminate terms of imprisonment from two to six years on each of the narcotics counts, a maximum of three years on each of the weapons and conspiracy counts, and an unconditional discharge on the marijuana count. Said sentences were decreed to run concurrently.

On October 21, 1985, this judgment of conviction was unanimously affirmed by order of the Supreme Court of the State of New York, Appellate Division, Second Judicial Department. *People v. Gonzalez,* _____ A.D.2d _____. Thereafter, on December 23, 1985, the Honorable Judith Kaye issued a certificate denying leave to appeal to the New York State Court of Appeals. *People v. Gonzalez,* _____ N.Y.2d _____.

The instant petition for a writ of certiorari was received on January 30, 1986.

Facts

During the early part of 1982, an investigation concerning the illegal narcotics activities of Vincent Gonzalez, a/k/a Tut, and William Nicastro was initiated by the New Rochelle Police Department, based upon information that said individuals were "dealing in cocaine" in Westchester County and specifically in New Rochelle, New York. As part of this investigation, a pen register was installed which monitored the telephone line (914 632-7017) listed to Vincent Gonzalez at 98 Fourth Street, New Rochelle. This was accomplished by obtaining a "lease line" from the New York Telephone Company, which ran from one of the appearances for the Gonzalez telephone line to a plant where the pen register was located. The procurement of said lease line and installation of said pen register was authorized by an order of the Honorable James R. Cowhey, County Court Judge, dated May 26, 1982, upon an application of the Office of the District Attorney supported by an affidavit of Assistant District Attorney Robert A. Neary.

The pen register became operational on June 8, 1982, and continued to operate until a wiretap was installed on July 9, 1982. This device decoded and recorded numbers dialed, the length of the call,* and the date and time it was

* If no connection was made (i.e., the call was not answered), no elapsed time was reflected.

made. The pen register also reflected incoming calls and their length, but not the point of origin. As installed, the pen register had no "audio output" and did not have the capacity to record actual conversations.*

On July 9, 1982, an eavesdropping warrant was signed by the Honorable James R. Cowhey permitting the overhearing and recording of certain telephonic communications over the line and instrument listed to Vincent Gonzalez as described above. This order was issued upon the application of District Attorney Carl A. Vergari and the affidavit of Detective Andrew Panessa in support thereof. Detective Panessa's affidavit was based upon physical surveillance, pen register surveillance, information from confidental informants (identified as CI-1, CI-2, CI-3, CI-4), information conveyed by Detective Curasi (described as acting in an "undercover capacity"); as well as personal knowledge and experience relating to illegal narcotics operations.

By way of a pre-trial motion, Gonzalez sought, *inter alia,* suppression of all evidence derived from the aforementioned wiretap. The bulk of the motion was devoted to a claim that Detective Panessa's affidavit in support of the eavesdropping warrant contained false information, "known at the time to the District Attorney to be untrue," essential to a finding of probable cause.** Specifically, defendant focused upon Panessa's recitation of information attributed to CI-1, a registered informant of the Federal Bureau of Investigation who had supplied information to Special Agent Dave Clark:***

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* It was not until an eavesdropping warrent was obtained that a listening device was added and the substance of conversations was overhead.

** There was no claim that probable cause was not established within the four corners of the warrant.

***Panessa never personally met nor directly spoke to this individual.

> CI-1 stated that Vincent "Tut" Gonzalez, William Nicastro and Frank Spinelli met two or three times a month, at which times a transfer of cocaine (ounces) occurs. Spinelli supplies it to Gonzalez and Nicastro, and the meetings take place at the Bottoms-up Bar, 10 South Division Street, New Rochelle, New York. One meeting occurred in March, 1982 at the Bottoms-up Bar. At this time, Spinelli delivered approximately seven ounces of cocaine to Gonzalez and Nicastro. CI-1 did not state whether money was transferred at that time. The basis for CI-1's information is personal knowledge in that he saw the transaction, overhead conversation and heard admissions from Gonzalez and Nicastro concerning the transfers and meetings. Gonzalez, Nicastro and Spinelli were all known to CI-1 before these transactions, and Gonzalez is known by him to use the name Tut.

The defense contended that "no such transaction took place in March of 1982," and, in fact, Spinelli was in federal custody at that time. Further, it was claimed that the Office of the District Attorney was aware of Spinelli's federal incarceration in March 1982 due to the fact that Spinelli also had a pending Westchester County indictment (Indictment No. 80-00234) to which he entered a plea of guilty on March 23, 1982, and was sentenced to ninety days concurrent with his federal sentence.

The motion also challenged that portion of the Panessa affidavit referring to information developed by Detective Robert Curasi while working in an "undercover capacity" at the Pelham Meateria, claiming Detective Curasi was in fact moonlighting at the Pelham Meateria and was known to everyone to be a police officer.

Upon submission of opposition papers, a pre-trial hearing was ordered. In accordance therewith, an extensive

hearing was held (commencing on October 18, 1983, continuing on various dates and concluding on January 6, 1984), at which petitioner was afforded a full and adequate opportunity to explore the facts at issue.*

With respect to that portion of Panessa's affidavit relating information conveyed by CI-1, the detective testified that on March 12, 1982, he was told by Special Agent David Clark of the Federal Bureau of Investigation, New Rochelle Branch, that Clark had received information from a reliable confidential informant** concerning two individuals, Tut Gonzalez and William Nicastro, who were operating a disco on South Division Street in New Rochelle called "Bottoms-Up." Said individuals were, according to the informant, involved in "an operation of distribution of cocaine": the source of the supply was one Frank Spinelli. Spinelli would supply Gonzalez and Nicastro with several ounces of cocaine two or three times a month. The informant told Clark that on occasions when he observed Spinelli at the "Bottoms-Up" Bar he usually drove a Ford Mustang and wore his hair differently on different occasions. During the same conversation, Agent Clark stated that according to the informant Nicastro and Gonzalez were to receive up to eight ounces of cocaine on March 13 or 14, and that the informant would get in touch with the agent if in fact the transaction occurred. Panessa interpreted the conversation as indicating Spinelli would deliver the drugs. Detective Panessa further testified that he again spoke to Agent Clark on March 16, 1982. His recollection was that during said conversation Agent Clark told him that, according to the aforementioned informant, six or seven ounces of cocaine had in fact been delivered by Spinelli to William Nicastro and Tut Gonzalez at the "Bottoms-Up" bar on Saturday night, March 14.

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*Petitioner does not claim that the hearing was in any way deficient.

** Agent Clark supplied information regarding the informant's reliability, which was included in the Panessa affidavit. The informant was in fact "registered" with the FBI.

Thus, the testimony of the affiant officer did not contradict that set forth in the supporting affidavit.

Special Agent Clark of the FBI was also called as a witness by the prosecution. According to his testimony, the allegations set forth in Panessa's affidavit varied from the information actually conveyed by Clark to Panessa in the following respects:

(1) Clark testified that he had not told Panessa that Gonzalez received cocaine from Spinelli when Spinelli delivered cocaine to Nicastro; (2) Clark testified that he had not told Panessa that, according to CI-1, Gonzalez would be present at the March 1982 meeting; (3) Clark testified that CI-1 did not know who the source of cocaine would be at the March 1982 meeting; and thus did not say Spinelli would be present. However, in light of Clark's testimony, there was a reasonable basis for Panessa to believe that the information as set forth in his affidavit was true. Clark did tell Panessa that, according to CI-1, Gonzalez and Nicastro were close associates in the distribution of cocaine, and Gonzalez was aware of the "drop" that was to occur on the weekend of March 12, 1982. It was Clark's understanding that Gonzalez would be present when the cocaine was delivered. Spinelli had delivered quantities of cocaine to Nicastro at Bottoms-Up on a regular basis for over a year, and CI-1 had stated that he had been present on occasions when Spinelli had delivered cocaine to Nicastro.

Certified records of the United States Department of Corrections were introduced into evidence at the hearing to show that Frank Spinelli had in fact been in federal custody from February 2, 1982, until November 5, 1982; thus, he could not have been present at a March 1982 delivery of cocaine as set forth in the Panessa affidavit. Detective Panessa, however, testified that at the time he executed his affidavit, he was unaware of this fact.* Prior

* Special Agent Clark also testified that he had no knowledge prior to August 1982 that Spinelli was incarcerated during any portion of that year.

to executing the affidavit, the detective had examined an FBI rap sheet and a New York State rap sheet, neither of which reflected Spinelli's incarceration. The FBI rap sheet was obtained from the records of the New Rochelle Police Department; the New York State rap sheet was obtained between March 12 and March 16, 1982.* The New York State rap sheet indicated an arrest in Harrison for "possession of a weapon" but no disposition. That arrest was not mentioned in the affidavit as there was no conviction listed.

A number of witnesses were called to establish what, if any, knowledge members of the Westchester County District Attorney's Office had with respect to Spinelli's incarceration during March 1982. Assistant District Attorney John George testified that in May 1981 he was assigned to prosecute Indictment Number 82-235, *People v. Frank Spinelli,* involving an arrest by the Harrison Police Department on a weapons charge. In October 1981, Assistant District Attorney George became aware of the fact that there was a pending federal case against Spinelli. In late December 1981, Assistant District Attorney George was advised that Spinelli had entered a plea of guilty to his federal indictment and was free on bail pending sentence on February 2, 1982. Assistant District Attorney George was thereafter advised that sentence had been imposed and Spinelli was being held in the Metropolitan Correctional Center in Manhattan. The prosecutor then took various steps to have Spinelli returned to Westchester County for disposition of his pending indictment in that county. A writ was secured, and on March 23, 1982, Spinelli was brought to Westchester County, entered a plea of guilty, and was sentenced to 90 days' imprisonment concurrent with his one-year federal sentence, and returned to Metropolitan Correctional Center.

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* Panessa testified that the purpose of procurring Spinelli's rap sheets was "to check his criminal history, to see if there was any pending arrest, or to make sure that he wasn't in jail."

The witness testified that he discussed the disposition of the *Spinelli* case with First Deputy District Attorney Anthony Molea in March 1982. The discussion pertained solely to numerous legal problems and the possibility of a misdemeanor disposition. The pending Spinelli indictment was not discussed with any member of the Rackets Bureau (which was in charge of the Gonzalez investigation) of the District Attorney's Office, District Attorney Carl A. Vergari, or any New Rochelle police officer.* Assistant District Attorney George was not aware of the investigation being conducted by Detective Panessa and Assistant District Attorney Thomas E. Bisordi, Rackets Bureau, which led to Gonzalez's indictment.

With respect to that portion of Panessa's affidavit which referred to New Rochelle Detective Curasi as working in an "undercover capacity" at the Pelham Meateria, Detective Panessa explained his use of this label as follows:**

> The reason why that term was used, my Supervisor, Detective Sergeant Edward Sheehy, has a policy of any time a police officer receives information and he's off duty, he's in an undercover capacity. It is a policy he has. He has the power within the department to set policies like that within his unit.

Former Assistant District Attorney Thomas Bisordi also indicated that a decision was made to adopt the New Rochelle Police Department's "undercover" terminology when drafting the eavesdropping affidavit.

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* This fact was confirmed by testimony elicited from Assistant District Attorney Molea and members of the Rackets Bureau involved in the instant investigation.

** Detective Curasi was moonlighting as a butcher at the Meateria; his employer was aware of the fact that Curasi was also employed as a police officer.

POINT I

The application of the *Franks v. Delaware* doctrine to the facts of this case rested upon a credibility determination in the trial court. No constitutional issue is presented for this Court's review.

In the landmark case of *Franks v. Delaware,* 438 U.S. 154, the United States Supreme Court rejected the position that a defendant may under no circumstances challenge the veracity of a sworn statement used by the police to procure a search warrant. Such a rule, it was held, would denude the probable-cause requirement of any real meaning. The guiding principle was thus articulated as follows:

> [W]here the defendant makes an substantial preliminary showing that a false statement knowingly and intentionally, or with reckless disregard for the truth, was included by the affiant in the warrant affidavit, and if the allegedly false statement is necessary to the finding of probable cause, the Fourth Amendment requires that a hearing be held at the defendant's request. In the event that at the hearing the allegation of perjury or reckless disregard is established by the defendant by a preponderance of the evidence, and, with the affidavit's false material set to one side, the affidavit's remaining content is insufficient to establish probable cause, the search warrant must be voided and the fruits of the search excluded to the same extent as if probable cause was lacking on the face of the affidavit (*supra* at 155-6).

These principles were properly applied in the case at bar. Based upon the allegations set forth in the defendant's moving papers, an extensive evidentiary hearing, at which all the relevant issues were fully explored, was in fact held.* At the conclusion thereof, the presiding judge

* There was no contention that the hearing was in any way inadequate.

expressly found all the prosecution witnesses to be credible. The discrepancies between the information regarding the March meeting imparted to Clark by CI-1 and conveyed to Panessa, and that set forth in the Panessa affidavit, were found to be "attributable to the relaying of information through various persons." "The distortions arose from the conveyance of information and not from lying or willful or reckless disregard for the truth" (A10).* The court further refused to adopt a theory of "imputed knowledge" with respect to Spinelli's incarceration, and held that the facts as set forth in his affidavit were as Panessa reasonably believed them to be. Finally, the court ruled that the reference to Detective Curasi as "undercover" was not a falsehood (A12-13). The state appellate court ruled that "the record supports the determination that defendant failed to meet his burden of proof, by a preponderance of the evidence, that a police officer's affidavit in support of the application for an eavesdropping warrant contained perjured inaccuracies or misstatements made with a reckless disregard for the truth" (A2).

Petitioner's disagreement with the result does not amount to a Constitutional claim worthy of review. The *Franks* rule clearly requires a specific *mens rea* on the part of the affiant officer: a finding the trial court, after hearing and observing the witness, refused to make. Rather, the only issue, once a full hearing was held as directed by *Franks*, was a credibility determination solely within the province of the trial court (see *People v. Wright*, 71 A.D.2d 585, 586; *People v. Mendez*, 75 A.D.2d 400, 404).

The standard to be applied upon a challenge to the veracity of statements in an affidavit in support of a warrant has been fully set forth in *Franks v. Delaware;* the application to the precise facts of this case does not warrant review by this Court.

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* Referring to pages of petitioner's appendix.

POINT II

This Court has clearly held that the installation and use of a pen register is not a "search" within the meaning of the fourth amendment, and hence no warrant is required (*Smith v. Maryland*, 442 U.S. 736).

The United States Supreme Court in the case of *Smith v. Maryland*, 446 U.S. 736, held that the installation and use of a pen register is not a "search" within the meaning of the fourth amendment, and hence no warrant is required. In so ruling, the Court determined that an individual could claim no "reasonable expectation of privacy" (see *Katz v. United States*, 389 U.S. 347*) in information voluntarily turned over to the telphone company.

The pen register at issue had no features which would remove it from the purview of this rule. As to outgoing calls, the instant pen register furnished the police with no more information than Gonzalez voluntarily gave to the telephone company: the telephone company commonly keeps track of the length of calls, numbers dialed, date and time, and whether or not a connection was made. The fact that this pen register also reflected incoming calls and their length (but not point of origin) in of no moment. The telephone company can, if it chooses, determine the existence of incoming calls, their length, and even point of origin (via a telephone "trace"). Thus, the "expectation of privacy" is no different. The fact that the telephone

* In *Katz*, the Supreme Court held that a fourth amendment "search" occurred where government agents had intercepted the *contents* of a telephone conversation by attaching a listening device to the outside of a public telephone booth. In distinguishing *Katz*, the Court in *Smith* held:

> [A] pen register differs significantly from the listening device employed in *Katz*, for pen registers do not acquire the contents of communications (*supra*, at 741).

company chooses to bill on an out-going basis should not make a "constitutional difference" (see, *Smith v. Maryland, supra,* at 745).

Nor should the employment of a "lease line," which ran from one of the appearances for the Gonzalez telephone line to a plant where the pen register was located, alter the analysis. There is nothing in the language of the *Smith* decision or subsequent case law which so limits the rule of law. The information obtained and the expectation of privacy is the same regardless of the actual location of the pen register. It is the type of information, not the location of the pen register, which is determinative.

As installed, this pen register has no "audio output" and did not have the capacity to record actual conversations. Thus, under established law, the fourth amendment was not triggered,* and the content of the affidavit supporting the court order (which was not constitutionally required) becomes irrelevant.** Police officers should not be penalized, or their actions subjected to greater scrutiny, for seeking judicial approval when none is needed.

The governing rule having been already established by this Court, review in this case is unwarranted.

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* The fact that the New York telephone company, as a matter of company policy, requires a court order before they will provide information or a lease line does not create a fourth amendment issue or implicate the exclusionary rule.

** In the case at bar, a court order was in fact obtained. However, the state courts did not reach the issue of whether probable cause was established (see A2-3, A14-17).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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